BAIL SLIP

The Appellants 5 and 6 / Accused 5 and 6 [viz.] Rathinam and Kannan in SC.No.263/03 on the file of the District and Sessions Judge, Nagapattinam were directed to be released on bail as per the order of this Court dated 8.3.20006 and made in Crl.M.P.No.1232/2006 in Crl.Appeal No.1109/2004.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.10.2006

CORAM

THE HONOURABLE MR.JUSTICE R.BALASUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

CRIMINAL APPEAL NO.1109 OF 2004

1.Sankar
2.Selvam
3.Billa @ Senthil Kumar
4.Kuppusamy
5.Rethinam
6.Kannan .. Appellants
[Accused Nos.1 to 6]

Vs.

State represented by
the Inspector of Police,
Vaippar,
Tiruvarur Taluk Police Station,
Tiruvarur
(Crime No.270 of 1999) .. Respondent

This criminal appeal is preferred under Section 374 Cr.P.C against the judgment of the learned District Sessions Judge, Nagapattinam made in S.C.No.263 of 2003, dated 30.3.2004.

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For Appellants : Mr.S.Nagamuthu
for A-1, A-2, A-4 to A-6

Mr.R.Sankarasubbu
for M/s.Rajanikanth for A-3

For Respondent : Mr.N.R.Elango, A.P.P.

JUDGMENT

(The judgment of the Court was made by M.CHOCKALINGAM, J.)

The appellants, six in number, have challenged the judgment of the learned District Sessions Judge, Nagapattinam made in S.C.No.263 of 2003, whereby they stood charged, tried and found guilty as follows:

Charges:

| | |
|---|---|
| A2,A3,A5 & A6 | Section 120-B IPC |
| A-4 | Sections 147, 302 r/w S.149 & 323 IPC |
| A-1 to A-3 | Sections 148, 302 or 302 r/w S.34 IPC |
| A-5 and A-6 | Section 302 r/w S.120-B IPC |

Conviction and Sentence:

| | |
|---|---|
| A-1 to A-3 | - S.148 IPC - 2 years RI<br>- S.302 r/w S.34 IPC - life imprisonment and a fine of Rs.2000/- with default sentence. |
| A-4 | - S.147 IPC - 1 year RI<br>- S.323 IPC - 1 year RI<br>- S.302 r/w S.149 IPC - life imprisonment and a fine of Rs.2000/- with default sentence. |
| A-5 & A-6 | - S.302 r/w S.109 IPC - life imprisonment and a fine of Rs.2000/- with default sentence. |
| A-2, A-3, A-5 and A-6 | - no separate sentence awarded under S.120-B IPC. |

2.The short facts necessary for the disposal of this appeal can be stated thus:

a)P.W.1, who is the son of the deceased Viswanathan, is the native of Kekarai Village. P.Ws.2,3,5 and 6 belonged to the same place. The said Viswanathan had six sons. The fifth accused, Rathinam was manufacturing and selling arrack, which was being objected to by the deceased. On 24.6.1999, he arranged for roko and fasting condemning the act of the police in not preventing the said menace. Ex.P.6, notice was also issued, which was printed in a press of P.W.9. On 19.6.1999 at about 8.00 p.m. near the Kekarai Railway Gate, P.W.6 saw the conspiracy hatched up between A-2, A-3, A-5 and A-6 and at that time, A-5 said that the deceased should be finished off.

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b)On 1.7.1999 at about 5.30 p.m., the deceased was coming in his vehicle and P.W.1 was also with him. When they were nearing the railway gate, from the house of A-5, A-1 and A-2 armed with aruval, A-3 armed with velstick, the fourth accused unarmed and the other accused came to the place of occurrence. All the accused surrounded the deceased and it was the first accused, who attacked the deceased first and the other accused have followed him. The deceased was done to death in the place of occurrence. This was witnessed by P.W.1 and also by P.Ws.2 and 3. When a crowd gathered, all the accused fled away from the place of occurrence.

c)P.W.1 proceeded to the Tiruvarur Rural Police Station, where P.W.13, the Head Constable was on duty, to whom, P.W.1 gave Ex.P.1, the report. On the strength of which, a case came to be registered in Crime No.270 of 1999 under Sections 147, 148, 341, 323, 324 and 302 IPC. Ex.P.7, the express first information report was despatched to the Court. On receipt of the copy of the first information report, P.W.17, the Inspector of Police took up the investigation, proceeded to the scene of occurrence, made an inspection in the presence of the witnesses and prepared Ex.P.2, the observation mahazar and Ex.P.13, the rough sketch. He conducted inquest on the dead body of the deceased in the presence of the witnesses and panchayatdars and prepared Ex.P.14, the inquest report. Following the same, the dead body of the deceased was sent for the purpose of autopsy to the Government Hospital, Tiruvarur.

d)P.W.1 was treated by P.W.15, the Doctor attached to the Government Hospital, Tiruvarur. He has issued Ex.P.10, the accident register. P.W.14, the Doctor attached to the Government Hospital, Tiruvarur has conducted autopsy on the dead body of the deceased and has issued Ex.P.9, the post-mortem certificate, wherein he has opined that the deceased would appear to have died of shock and haemorrhage due to the injuries sustained.

e)Pending investigation, the Investigating Officer has arrested Mohan, the juvenile accused, in the presence of witnesses. On 4.7.1999, the fourth accused was arrested. The second accused was arrested on 7.7.1999. He volunteered to give a confessional statement, which was recorded in the presence of the witnesses, the admissible part of which was marked as Ex.P.4. Pursuant to the confessional statement, he produced weapons of crime, which were recovered in the presence of witnesses under a cover of mahazar. A-3, A-6 and the other accused were also arrested. A-5 was taken to the police custody. All the accused were sent for judicial remand.

f)All the material objects recovered from the place of occurrence, from the dead body of the deceased and the M.Os recovered from the accused were subjected to chemical analysis by the Forensic Science Department. Ex.P.18, the Chemical Analyst's report and Ex.P.19, the Serologist's report were received. On completion of the investigation, the Investigating Officer has filed the final report.

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3.Since one of the accused was absconding and one of the accused was juvenile, the case was split up and in respect of the other accused, the case was committed to court of sessions and necessary charges were framed. In order to substantiate the charges levelled against the accused, the prosecution has examined 18 witnesses and relied on 20 exhibits and 14 M.Os. On completion of the evidence on the side of the prosecution, the accused were questioned under Section 313 Cr.P.C procedurally as to the incriminating circumstances found in the evidence of prosecution witnesses, which they flatly denied as false. On the side of the defence, one witness was examined and one document was marked. On completion of the evidence on both sides, the trial court heard the arguments advanced by both sides and has found the appellants guilty as mentioned above and awarded punishment as referred to above, which is the subject matter of challenge before this Court.

4.Advancing his arguments on behalf of the appellants, the learned counsel would submit that in the instant case, the prosecution relied on the evidence of P.Ws.1 to 3; that if their evidence was carefully scrutinised, the lower court should have rejected their evidence in entirety; that P.W.1 is the son of the deceased; that P.Ws.2 and 3 are the interested witnesses; that lower court has believed a part of the case of prosecution that there was conspiracy hatched up by the accused even as early as on 19.6.1999; that the occurrence has taken place on 1.7.1999; that it is pertinent to point out that P.W.6 was working under the deceased during the relevant time; that if to be so, it is quite natural, one would expect him to inform such a conspiracy either to his master or to the interested persons; that after the death of the deceased and after the case was taken up, he came forward to inform the same; that the circumstances that P.W.6 was working under the deceased and from 19.6.1999 to 1.7.1999, he did not speak about such a conspiracy to anybody and even he did not go to the police station to inform the same would go to show that his evidence as to the conspiracy should have been rejected and thus, the prosecution has miserably failed to prove the same and that, if that part of the case of prosecution fails, the entire case of prosecution should have been rejected.

5.Attacking the evidence of P.W.1, the learned counsel would submit that P.W.1 is the son of the deceased and hence, his evidence should be carefully scrutinised; that in the instant case, the strong circumstance against the prosecution is the evidence of P.W.11; that according to P.W.11, he was the Head Constable of Thiruvarur Taluk Police Station and he went to the place of occurrence along with the Inspector at about 6.00 p.m. and the dead body was found and they could not identify the dead body and later, they came to know that it was that of the deceased; that when the witness was not treated as hostile, the said evidence is binding on the prosecution; that the evidence of P.W.11 would go to show that the deceased person was identified subsequently. Added further the learned counsel that in the instant case, the evidence of P.W.1 would go to show that the information what is available before the Court was not the first

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information and apart from that, P.W.1 was also medically treated by P.W.15, the Doctor at about 9.30 p.m.; that at that time, P.W.1 has stated that at the time of occurrence two known persons and three unknown persons have attacked him; that his evidence would clearly indicate that the evidence of P.W.1 is highly unreliable; that had it been true that P.W.1 has mentioned all the names of the accused in the FIR, there was no need for him to give a statement to the Doctor stating that two known persons and three unknown persons have attacked him; that in the instant case, the evidence of P.Ws.2 and 3, when carefully scrutinised, do not corroborate the evidence of P.W.1; that the medical evidence also did not support the case of prosecution; that without considering all the aspects of the matter, the lower court has found that there was conspiracy, pursuant to which all the accused have attacked the deceased and caused his death instantaneously and hence, the judgment of the lower court suffers both factually and legally and the same has got to be set aside.

6.Heard the learned Additional Public Prosecutor on the above contentions. The Court has paid its anxious consideration on the submissions made.

7.It is not in controversy that one Viswanathan, father of P.W.1, was done to death in an incident that took place on 1.7.1999 at about 5.30 p.m. Following the inquest made by the Investigating Officer, the dead body of the deceased was subjected to post-mortem by P.W.14, the Doctor. He has issued Ex.P.9, the post-mortem certificate, wherein he has opined that the deceased would appear to have died of shock and haemorrhage due to the injuries sustained. The fact that the deceased died out of homicidal violence was never questioned by the appellants/accused at any point of time. Hence, without any impediment, it has got to be recorded so.

8.In order to substantiate the case of prosecution, the prosecution relied on the evidence of P.Ws.1 to 3 as eyewitnesses. True it is, P.W.1 was the son of the deceased. Merely on the ground of relationship, the evidence of P.W.1 cannot be discarded. The Court is mindful of care and caution made by the Apex Court that the evidence has got to be scrutinised carefully. The Court is of the considered opinion that on exercising the said test, the evidence of P.W.1 inspired the confidence of Court and to the advantage of the prosecution, it had the evidence of P.Ws.2 and 3. The evidence of P.W.1 fully corroborates the evidence of P.Ws.2 and 3. Now, at this juncture, it is to be pointed out that the medical evidence through the post-mortem Doctor and the post-mortem certificate also was in full corroboration with the ocular testimony.

9.It is true, the prosecution has projected its case to start with conspiracy. The Court has to agree with the contention of the learned counsel for the appellants in respect of the conspiracy. The prosecution, in order to prove the same, has examined P.W.6. It is a matter of surprise to note that P.W.6, who was working under the deceased, came to know about

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the conspiracy on 19.6.1999, but he did not speak about the same for nearly about 12 or 13 days and after the occurrence has taken place, he came forward to speak about the same. It was the strong circumstance to reject the conspiracy part. The reply given by the learned Additional Public Prosecutor in this regard was not convincing. In a given case where there is no direct evidence available as to the conspiracy, the Court can infer conspiracy from the proved facts. In the instant case, the Court is of the considered opinion that there is no material available to hold that any conspiracy was hatched up. The evidence of P.Ws.1 to 3 would go to show that A-1 to A-4 and the other two accused, namely one absconding accused and one juvenile accused, were present at the time of occurrence and they have attacked the deceased. It is a case, where all the accused, who were available at the place of occurrence, restrained the deceased and attacked him and unless and until, there was any common object to do so, they could not have been present at the place of occurrence with deadly weapons.

10.In the instant case, P.W.1 was not only an eyewitness, but also an injured witness. It is a settled proposition of law, unless and until strong circumstance or reason is noticed by the Court, the evidence of the eyewitness, who is injured, cannot be discarded. The Court is satisfied that the prosecution has proved the case that there was an unlawful assembly by A-1 to A-4 along with one absconding accused and juvenile accused and in furtherance of the common object, they attacked the deceased and caused his death instantaneously and they have also attacked P.W.1 and in respect of the same, medical opinion was also canvassed.

11.Under these circumstances, the judgment of conviction under Section 120-B IPC is set aside and the accused Nos.2,3,5 and 6 are acquitted of the said charge. The conviction and sentence imposed on A-1 to A-4 in respect of the other offences are sustained. Insofar as A-5 and A-6 are concerned, the Court is unable to notice any material to connect them with the crime and hence, the conviction and sentence imposed on A-5 and A-6 are set aside and they are acquitted of the charges levelled against them. The bail bond, if any executed by A-5 and A-6, shall stand terminated. The fine amounts, if any paid by A-5 and A-6, shall be ordered to be refunded to them.

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12.In the result, the criminal appeal is dismissed in respect of A-1 to A-4 and the same is allowed in respect of A-5 and A-6.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

vvk

To
1.The Principal Sessions Judge, Nagapattinam.
2.The Judicial Magistrate, Tiruvarur
3. -do- through the Chief Judicial Magistrate, Nagapattinam.
4. -do- through the Chief Judicial Magistrate, Dindigul.
5.The District Collector, Nagapattinam/Cuddalore.
6.The Director General of Police, Chennai.
7.The Public Prosecutor, High Court, Madras.
8.The Superintendent, Central Prison, Cuddalore.
9.The Inspector of Police, Vaippar,
Tiruvarur Taluk Police Station, Tiruvarur.
10. The Section Officer,
Writ Section, High Court,
Madras.

C.A.NO.1109 OF 2004
25.10.2006

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